Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 03-687

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

FLORENCE KENYON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD J. KENYON, SR.,

Respondent.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

REPLY BRIEF FOR PETITIONER

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As Reynolds demonstrated in its petition, the Florida state courts have blatantly disregarded this Court's precedent on a recurring federal question of tremendous importance—namely, whether federal law preempts state laws and rules permitting a jury to impose liability on tobacco companies for the mere manufacture and sale of cigarettes. In *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ("*Brown & Williamson*"), and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) ("*Geier*"), this Court concluded, respectively, that federal policy prohibits a ban on the manufacture of cigarettes and that States cannot, consistent with conflict preemption principles, impose tort liability on a manufacturing practice that Congress sanctions. Pet. 9-12. Taken together, these cases stand for the proposition that tobacco companies cannot be held liable for merely manufacturing cigarettes as such liability would be conflict preempted. Ignoring this precedent, the Florida Circuit Court for the Thirteenth Judicial Circuit and the Second District Court of Appeal permitted a jury to impose liability on Reynolds simply for manufacturing cigarettes. *Id.* at 12-14. The District Court of Appeal also refused to publish the reasons for its erroneous decision, thereby precluding the Florida Supreme Court from correcting this legal error or issuing an opinion. *Id.* at 22-23.

Kenyon's opposition fails to refute these basic points. Kenyon does not dispute the importance of the question presented, its potential to impact thousands of cases, or the gamesmanship of the lower court. *Id.* at 21-22. Rather, knowing that there is no valid legal argument to support the decision below, Kenyon attempts to recast this case. Kenyon argues that the conflict preemption question presented is not implicated here because the jury did not hold Reynolds liable for merely manufacturing cigarettes. In Kenyon's view, the jury found Reynolds "strictly liable for producing and selling defectively designed cigarettes" (Opp'n 1), specifically for failing to adopt "alternative, safer designs" of cigarettes. *Id.* at 6. This theory of liability, however, is inconsistent with

Kenyon's position in the lower courts, irreconcilable with the jury's verdict and contrary to the record.

Kenyon's opposition (Opp'n 8-11) in fact demonstrates the wrong-headed legal analysis adopted by the courts below. As in the lower court proceedings, Kenyon argues that conflict preemption principles do not apply in tobacco cases and that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("*Cipollone*"), holds that tobacco claims are subject only to "the express preemption of state laws." Opp'n 8. This argument sorely misreads *Cipollone* and fails to account for the Court's later decisions in *Geier* and *Brown & Williamson*. Accordingly, this Court's summary reversal of the Florida court's decision is both necessary and appropriate.

I. KENYON WRONGLY ASSERTS THAT THE QUESTION PRESENTED IS NOT IMPLICATED HERE.

Kenyon's principal argument in opposition is that "Reynolds was not found liable for merely producing and selling cigarettes" but for "producing and selling defectively designed cigarettes." Opp'n 1. Specifically, Kenyon asserts that Reynolds was held liable for failing to adopt "alternative, safer designs" of cigarettes. *Id.* at 6. This argument is flatly wrong.

As an initial matter, the claim that the jury's verdict rests on some alternative legal theory (Opp'n 4-8) is inconsistent with Kenyon's position in the courts below. Pet. 12-15; Pet. App. 16a-17a, 50a-56a. Heretofore, Kenyon has defended the jury's verdict by arguing that "with respect to tobacco, the doctrine of conflict preemption may not be used to extend the preemption expressly provided by statute" (Pet. App. 54a), not by concocting an alternative rationale for the jury's verdict. *See also id.* at 16a-17a (arguing to circuit court that conflict preemption does not apply).

Indeed, this argument is remarkable because Kenyon did not even present this alternative-design theory of liability to the jury. Kenyon repeatedly asserted at trial that "*[w]e don't have a claim that they should have made some alternative design product.*" Pet. App. 26a (emphasis supplied). Instead, Kenyon argued "that [cigarettes] shouldn't have been available to [Kenyon] in the form that they were in. Period. That's what the plaintiff contends, that they were defective and reasonably dangerous in that sense. Now they claim, well, you know, we couldn't have made them any other way or something like that. That's their defense." *Id.* Kenyon failed to call a single witness to testify about this alternative-design theory. For this reason, the opposition cites *no* testimony by Kenyon's experts demonstrating some supposed alternative cigarette design. The opposition references only testimony from Reynolds' examination of its own expert showing that *no* safer, commercially feasible alternative in fact exists.[1] Having failed to even argue alternative design as a theory of liability at trial, Kenyon's current claim that the jury based its verdict on this theory is incredible.

In addition, Kenyon's contorted view of the proceedings below is irreconcilable with the jury's actual verdict. The jury concluded that there was *no* "negligence on the part of Defendant R.J. Reynolds Tobacco Company for failing to exercise reasonable care in the design of its products." Pet. App. 6a. It nonetheless concluded that Reynolds' cigarettes were "defectively designed." *Id.* There is only one way to

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[1] The fact that Reynolds argued that there are no safe alternative cigarette designs and no safe cigarettes (Opp'n 2-5) is irrelevant to the pertinent legal error. Under *Brown & Williamson* and *Geier*, Reynolds' argument was both appropriate and correct. Pet. 9-16. The error occurred when Kenyon misused this defense, by arguing that Reynolds should be liable for producing cigarettes "period" (*see* Pet. 4-8), and the jury based its verdict on this argument.

reconcile the jury's conclusion that Reynolds was *not negligent* in designing its cigarettes but nonetheless produced a defective product: the jury concluded that cigarettes are never safe and held Reynolds liable for manufacturing them. *See Light v. Weldarc Co.*, 569 So.2d 1302, 1303 (Fla. 5th Dist. Ct. App. 1990).

In all events, the jury could not have based liability on some alternative design claim because there was *no* evidence that Kenyon would have used these alternative products, as was required for Kenyon to prevail. *See* Pet. App. 12a, 25a-26a. In Kenyon's view, this evidence was unnecessary precisely because "[w]e don't have a claim that they should have made some alternative design product." *Id.* at 26a.

Kenyon's specific references to the record also fail to support this argument. Contrary to Kenyon's claim (Opp'n 1-2), the lower court did not conclude that the concepts of conflict preemption were subsumed in its jury instructions. The court, indeed, recognized that Reynolds' conflict preemption argument was squarely raised by this case when it observed that it was an "appropriate appellate issue." Pet. App. 17a. The trial court's repeated rejection of Reynolds' conflict preemption argument—by denying Reynolds' motion for summary judgment, motion for a directed verdict and motion for a new trial on this issue—further demonstrates that the court did not acquiesce in Reynolds' preemption argument.

Kenyon's reading of the instruction is also just wrong. With respect to cigarette manufacturing, Reynolds requested two independent instructions: an instruction that cigarette manufacturing is legal (proposed instruction seventeen) and an instruction on conflict preemption (proposed instruction eighteen). Pet. App. 48a-49a. In the passage Kenyon cites, the circuit court concluded only that the first instruction on the legality of manufacture, *not* the conflict preemption instruction, was unnecessary because the jury instruction "recognizes the fact that [Reynolds'] products were

manufactured legally." Opp'n 2 (quoting Pet. App. 28a). The judge refused to give the key instruction that Reynolds could not be held liable in tort merely for manufacturing a lawful product, because it accepted Kenyon's wrong reading of Supreme Court precedent. Pet. App. 17a.

The snippets of testimony Kenyon cites (Opp'n 6-8) to attempt to demonstrate some alternative verdict are similarly inadequate to support this argument. For example, the jury could not have concluded that Reynolds was liable for failing to employ cigarette "designs developed by Dr. Claude Teague" (Opp'n 6), because (as Kenyon concedes, *see id.*) Dr. Teague's designs were never "demonstrated to actually work," and were not commercially feasible. Indeed, the testimony Kenyon cites for this argument is actually testimony from Reynolds' own expert about how Dr. Teague's designs were *not* commercially feasible alternatives. Opp'n App. 7.

Kenyon is equally wrong (Opp'n 6-7) to claim that the jury could have found Reynolds liable for failing to supplement its cigarettes with more reconstituted tobacco. Here, too, the testimony Kenyon cites consists solely of statements from Reynolds' own witness explaining why adding more reconstituted tobacco to cigarettes is *not* a feasible alternative. *Id.*[2] The claim that Reynolds could have been found liable for failing to utilize an alternative flue-curing process (Opp'n 7-8) fares no better. Again, the

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[2] The testimony is that Reynolds pioneered reconstituted tobacco and, for nearly fifty years, has used as much reconstituted tobacco in its products as possible. Opp'n App. 4-6. The only reason Reynolds does not add more is because any additional reconstituted tobacco would "alte[r] the taste characteristics [of cigarettes] and it's really not acceptable." Opp'n 7 (quoting Opp'n App. 5-6). In other words, including additional reconstituted tobacco in cigarettes would destroy the commercial feasibility of Reynolds' product because smokers would not smoke this product.

sole evidence on this point is testimony Reynolds elicited from its own expert showing that Reynolds implemented an alternative flue-curing process as soon as it was a safe and commercially feasible alternative. *See* Opp'n App. 8-12. Thus, far from proving that Reynolds failed to implement a safer alternative design, this evidence shows that Reynolds blazed the trail on design change whenever possible—a reality Kenyon failed at trial to deny.

In short, there can be no doubt, as the trial court itself suggested (Pet. App. 17a), that the conflict preemption question presented is an "appropriate appellate issue" implicated on the facts here.

II. KENYON'S CONFLICT PREEMPTION ANALYSIS IS LEGALLY ERRONEOUS.

The real issue before the Court, the one decided by the lower courts and tucked away at the end of Kenyon's opposition (Opp'n 8-11), is whether the District Court of Appeal and the circuit court erred under this Court's conflict preemption precedent in allowing the jury to impose liability on Reynolds simply for manufacturing cigarettes. In Kenyon's view, the lower courts committed no legal error because federal cigarette and tobacco laws have only an express preemptive effect. *Id.* at 8. For support, Kenyon cites a passage from this Court's decision in *Cipollone* which provides that "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." 505 U.S. at 517. Kenyon also argues that the Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) ("*Myrick*"), should be read to "reaffirm" that tobacco cases are "governed exclusively" by express preemption. Opp'n 10. Kenyon's legal argument is demonstrably wrong.

Kenyon's reliance on *Cipollone* is misplaced as that case concerned only preemption of state-law claims relating to the *labeling* of cigarettes and the *statements* of tobacco

manufacturers, areas specifically regulated by Congress. *See Cipollone*, 505 U.S. at 512. The Court did not consider, and could not have considered, the preemptive effect of federal law on a claim based simply on the manufacture of cigarettes, as no such claim was before it. *See id.* (identifying relevant claims as failure to warn, express warranty, fraudulent misrepresentation and conspiracy to defraud—not a design defect claim as in this case). Moreover, the case in which the Court actually considered the regulation of cigarette manufacture, *Brown & Williamson*, holds that a ban of cigarette manufacturing impermissibly conflicts with federal policy:

> Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statues is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

Brown & Williamson, 529 U.S. at 139.

In addition, *Cipollone* is inapposite because the Court was not faced, as it is here, with an actual conflict between state and federal requirements. Rather, the Court held that there was "*no* general inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." *Cipollone*, 505 U.S. at 518 (emphasis supplied).

In all events, this Court's subsequent decision in *Geier* forecloses Kenyon's reading of *Cipollone*. As Reynolds explained in its petition (Pet. 15-16), in *Geier*, the Court specifically considered whether express preemption clauses bar the application of conflict preemption principles and concluded that they do not. *See Geier*, 529 U.S. at 871. In

reaching this conclusion, moreover, the Court cited *Cipollone* for the proposition that "this Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent, and treats 'conflict' pre-emption as an instance of the latter." *Geier*, 529 U.S. at 884 (citing, *inter alia*, *Cipollone*, 505 U.S. at 545, 547-548 (Scalia, J., concurring in judgment in part and dissenting in part)).

Kenyon makes a futile attempt to avoid *Geier* by claiming that it is inconsistent with the Court's earlier decision in *Myrick*. Opp'n 10-11. Far from "reaffirm[ing]" that tobacco cases are "governed exclusively" by express preemption (Opp'n 10), *Myrick* provides that conflict preemption principles can apply in tobacco cases:

> As an initial matter, we must address the argument that we need not reach the conflict preemption issue at all. According to respondents and the Court of Appeals, *Cipollone* held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. *This argument is without merit.*
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> ***
>
> The fact that an express definition of the preemptive reach of a statute "implies"—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters does *not* mean that the express clause entirely forecloses any possibility of implied pre-emption. Indeed, just two paragraphs after the quoted passage in *Cipollone*, we engaged in a conflict pre-emption analysis of the [1965 Act] and found "no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." Our subsequent decisions have not read *Cipollone* to obviate the need for analysis of an individual statute's pre-emptive effects.

514 U.S. at 287-89 (internal citations omitted) (emphasis supplied). There is thus no support for Kenyon's incredible claim—accepted by the Florida courts below—that conflict preemption is inapplicable in tobacco cases. This Court's existing precedent holds exactly the opposite.

CONCLUSION

The petition should be granted, and either the Florida Second District Court of Appeal's decision should be summarily reversed or the Court should hear argument on the question presented.

Respectfully submitted,

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January 5, 2004